85-280

Supreme Court, U.S.
FILED
AUG 19 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
APRIL TERM, 1985

GORDON H. LAWHORN
VIOLET LAWHORN,

Petitioners,

v.

HAROLD C. KING,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

GERALD T. ZERKIN
ZERKIN, HEARD & SCOVILL
4 North First Street
Richmond, Virginia 23219

August 15, 1985

QUESTION PRESENTED

Is a landowner who has unsuccessfully sought a post-deprivation state court remedy for the taking of his property and subsequent withholding of promised compensation barred by the doctrine of *res judicata* from litigating in federal court a claim for the deprivation of his property without due process of law in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF AUTHORITIES.....	v
OPINIONS BELOW.....	2
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	3
STATEMENT OF THE CASE.....	3
JURISDICTION BELOW.....	6
REASONS FOR GRANTING THE WRIT.....	7
I. THE COURT SHOULD CLARIFY THE PROCEDURE FOR LITIGATING POSTDEPRIVATION DUE PROCESS CLAIMS.....	7
A. This Is A Case Of First Impression On An Important Issue.....	7
B. A State Satisfies Due Process By Providing A Postdeprivation Remedy.....	9
C. Unsuccessful Attempts In State Court To Obtain Compensation For Seized Property Under State Law Do Not Serve As A *Res Judicata* Bar To A Due Process Claim In Federal Court.....	11
D. Application Of The Doctrine Of *Res Judicata* Would Preclude	

Page

Federal Jurisdiction In All Postdeprivation Cases And Negate The Federalist Scheme Fashioned By This Court..... 14

CONCLUSION..... 18

APPENDIX..... **

A. Opinion of the United States Court of Appeals for the Fourth Circuit..... 1a

B. Opinion and Judgment of the United States District Court, Eastern District of Virginia... 13a

C. Complaint..... 18a

TABLE OF AUTHORITIES

Cases: Page

Brown v. Salt Lake City, 33 Utah 222, 93 P. 570 (1908)..... 13
Hogg v. Commonwealth, 30 1 Ky. 557, 192 S.W. 2d 487 (1946)..... 13
Hudson v. Palmer, ___U.S.___, 104 S. Ct. 3194 (1984).....passim
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)..... 9
Parratt v. Taylor, 451 U.S. 527 (1981).....passim
Rhodes v. Meyer, 225 F. Supp. 80, 105 (D. Neb., 1963), aff'd., 334 F. 2d 709, cert. denied, 379 U.S. 915 (1964), motion denied, 258 F. Supp. 546, aff'd., 418 F. 2d 1309, cert. denied, 397 U.S. 1049 (1970)..... 14
Ritchie v. Johnson, 158 Kan. 103, 144 P. 2d 925 (1944)..... 13
Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923)..... 13
State ex rel. Herman v. Schaffer, 105 Ariz. 478, 467 P. 2d 66 (1970).. 15
United States v. McLean, 95 U.S. 750 (1878)..... 13
Whitehurst v. Duffy, 181 Va. 637, 26 S.E. 2d 101 (1943)..... 12

Statutes:

28 U.S.C. § 1254..... 2
28 U.S.C. § 1343..... 6
United States Constitution, Amendment V.....2,3
United States Constitution, Amendment XIV.....2,3
Virginia Code § 2.1-22.3.1..... 4

Page

Miscellaneous:

1 Am. Jur. 2d, Actions..... 13

IN THE
SUPREME COURT OF THE UNITED STATES
APRIL TERM, 1985

No.

GORDON H. LAWHORN
VIOLET LAWHORN,

Petitioners,

v.

HAROLD C. KING,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioners, Gordon H. Lawhorn and Violet Lawhorn, landowners in the Commonwealth of Virginia, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals For The Fourth Circuit, which affirmed the dismissal of their complaint upon a plea of res

judicata. The petitioners challenge that court's hodling that their due process claim under the Fifth and Fourteenth Amendments to the U.S. Constitution is barred by their unsuccessful attempt to obtain a state court remedy for the deprivation of their real property.

OPINIONS BELOW

The unpublished opinion of the United States Court Of Appeals For the Fourth Circuit affirming the dismissal of petitioners' complaint is attached as Appendix A. The unpublished opinion and judgment of the United States District Court For The Eastern District Of Virginia dismissing petitioners' complaint are attached hereto as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals is dated May 20, 1985. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution, which provides, in relevant part:

> "[N]or shall [any person] be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.";

and the Fourteenth Amendment to the United States Constitution, which provides, in relevant part:

> "[N]or shall any State deprive any person of life, liberty or property, without due process of law."

STATEMENT OF THE CASE

The petitioners, Gordon H. and Violet Lawhorn, are owners of real property located in Hanover County, Virginia, on which they operate a business. In 1954, as part of a condemnation proceeding, the State Department of Highways entered into an agreement with petitioners whereby the Department agreed to maintain a crossover from the northbound

lane to the southbound lane fronting petitioners' property. The order entered in the condemnation proceedings evidenced this agreement between the parties. Subsequently the Department built the four-lane divided highway but refused to construct the crossover as agreed. Petitioners at that time brought suit in Hanover County Circuit Court seeking the issuance of a temporary restraining order and preliminary injunction requiring specific performance of the contract. That court, sitting as a court in equity, held that petitioners had not obtained a property interest in the condemnation decree, and that, though valid, the contract between petitioners and the Department, was unenforceable.

On July 11, 1979, petitioners filed a claim with the respondent, pursuant to Va. Code § 2.1-22.3.1 et seq. for damages arising from the breach of contract.

Petitioners thereafter filed a motion for judgment seeking damages for the breach of contract. The Circuit Ccurt of the City of Richmond, Division I, held that that action was barred under the doctrine of collateral estoppel, in that it had been decided in the earlier action that the contract, though valid, was unenforceable. The Supreme Court of Virginia affirmed that decision.

Petitioners initiated this suit alledging that their right not to be deprived of their property without just compensation or due process of law has been violated by virtue of respondent's refusal to honr the contract and his inability to obtain a postdeprivation hearing under state law and procedures. Respondent moved to dismiss this action on several grounds, and the United States District Court For The Eastern District of Virginia

granted the motion to dismiss on the alternative grounds that (1) the action was barred by the doctrine of res judicata and (2) petitioners had failed to state a cognizable constitutional claim. Opinion Order of United States District Court, April 18, 1984, Appendix B. hereto. The United States Court of Appeals For the Fourth Circuit affirmed the District Court's decision solely on the grounds of res judicata. Opinion and Order of May 20, 1985, Appendix A hereto.

JURISDICTION BELOW

Jurisdiction in the United States District Court was based on 28 U.S.C. § 1343.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD CLARIFY THE PROCEDURE FOR LITIGATING POST-DEPRIVATION DUE PROCESS CLAIMS

A. This Is A Case Of First Impression On An Important Issue

By this petition, the plaintiffs seek to clarify the procedure to be followed by property owners who have unsuccessfully sought a state remedy for the deprivation of their property pursuant to the mandates of this Court in Parratt v. Taylor, 451 U.S. 527 (98]) and Hudson v. Palmer, 104 S.Ct. 3194 (1984). In those cases, this Court held that a property owner was required to seek a state court remedy for the deprivation of his property when that deprivation could not reasonably have been anticipated. The petitioners, having followed that mandate, have now been prevented from litigating their federal due process claim in federal court, a result which petitioners be-

lieve is inconsistent with the intent of Parratt and Hudson.

Petitioners are unaware of any other decision on the question presented here: whether federal due process claims under Parratt and Hudson must be litigated in state court in conjunction with attempts to obtain a state remedy or be barred under the doctrine of res judicata. Since Parratt and Hudson established the necessity to seek a state remedy, it is essential for this Court to advise property owners who have suffered a deprivation as to the proper forum in which to litigate the federal claims arising from that deprivation. The language of Hudson suggests a result different than that reached by the Court of Appeals herein and without guidance from this Court, such property owners may inadvertently lose their federal claims while attempting to satisfy the man-

date of Hudson.

B. A State Satisfies Due Process By Providing A Postdeprivation Remedy Whenever It Cannot Provide A Predeprivation Remedy

Critical to the result in this case is the characterization of petitioners' due process claim as a predeprivation claim under Logan v. Zimmerman Brush Co., 455 U.S. 422 (]982), or a post-deprivation claim under Parratt v. Taylor, supra. and Hudson v. Palmer, supra. In concluding that petitioners' claim fell under Logan, the Court of Appeals erroneously focused on the distinction between authorized and unauthorized state action, ignoring the actual holding in Hudson that"[t]he controlling inquiry is solely whether the State is in a position to provide for predeprivation process." 104 S.Ct. at 3204.

Analyzing the facts of this case, it is apparent that it falls within the ambit of Parratt and Hudson rather than that of Logar.

Regardless of whether the state action was authorized, it was not only impractical but, in fact, impossible for the state to provide due process prior to the deprivation. Petitioners lost their real property to the state in 1954, at which time they received compensation in the form of cash and a contractual promise that the state would build a crossover to their business when the planned highway was constructed. In reliance on that contract, they waived their right to a judicial determination of the compensation to be paid. Twenty-two years later, the state refused to build the crossover in breach of the contract which Virginia's courts have found to be valid, but unenforceable. Since, at the time the compensation was withdrawn, the petitioners had long since been deprived of their property, the provision of pre-deprivation due process was obviously impossible.

The state, therefore, could have satisfied due process by providing an adequate post-deprivation remedy. Parratt v. Taylor, supra. at 539-541; Hudson v. Palmer, 104 S. Ct. at 3204.

C. Unsuccessful Attempts In State Court To Obtain Compensation For Seized Property Under State Law Do Not Serve As A Res Judicata Bar To A Due Process Claim In Federal Court

As the Court of Appeals noted, the petitioners "have walked their claim through every avenue provided them by the state courts of Virginia." However, rather than finding that petitioners had thereby satisfied the pre-requisites for the commencement of their federal due process claim, the Court held that the state court actions served as a res judicata bar to that action. Such a result is inconsistent with the intent of this Court's due process decisions and would effectively preclude federal jurisdiction in all cases within the ambit of Parratt and

Hudson.

Petitioners' due process claim did not arise until the conclusion of the state court proceedings, since the state's action for due process purposes "is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy." Hudson v. Palmer, 104 S.Ct. at 3204. Nevertheless, the Court of Appeals would require the petitioners, and presumably all other Parratt and Hudson plaintiffs, to litigate their federal constitutional claims in conjunction with the very state court actions which must be completed as a prerequisite to the federal claim. Such a procedure would be impossible in Virginia, at least, where a "cause of action does not accrue, and action thereon cannot properly be commenced" until each "condition precedent to the right of action... is performed." Whitehurst v. Duffy, 181 Va. 637, 643, 26 S.E. 2d 101, 102 (]943). Indeed that

would appear to be the general rule.

> Before an action can properly be commenced all the essential elements of the cause of action must be in existence-that is, the cause of action must be complete. All valid conditions precedent to the institution of the particular action, whether prescribed by statute, fixed by agreement of the parties, or implied by law, must be performed or complied with before commencing the action... [emphasis added].

1 Am. Jur. 2d, Actions § 80, p. 79. See, also, United States v. McLean, 95 U.S. 750, 753 (1878): Brown v. Salt Lake City, 33 Utah 222, 93 p. 570, 573 (1908); Hogg v. Commonwealth, 301 Ky. 557, 192 S.W. 2d 487, 489-490 (1946); Small v. Morrison, 185 N.C. 577, 118 S.E. 12, 12 (1923); Ritchie v. Johnson, 158 Kan. 103, 144 P. 2d 925, 935 (1944). Since the State's refusal to provide a remedy was, under Hudson, a condition precedent to petitioners' due process claim, petitioners could not properly have commenced an action to enforce that claim

until the State's action was concluded. Since the fact of the State's denial of a remedy did not exist prior to the time of the state court judgment, the doctrine of res judicata cannot apply to petitioners' due process claim, which is dependent upon the existence of that fact. See, Rhodes v. Meyer, 225 F. Supp. 80, 105 (D. Neb., 1963), aff'd., 334 F. 2d 709, cert. denied, 379 U.S. 915 (1964), motion denied, 258 F. Supp. 546, aff'd., 418 F. 2d 1309, cert. denied, 397 U.S. 1049 (1970).

D. Application Of The Doctrine Of Res Judicata Would Preclude Federal Jurisdiction In All Postdeprivation Cases And Negate The Federalist Scheme Fashioned By This Court

Petitioners do not seek to expand federal jurisdiction or negate the purpose of Parratt and Hudson. Had Virginia provided a post-deprivation remedy, petitioners would have had no federal cause of action. Thus, property owners in Arizona in the same position

as petitioners would not have a federal due process claim because that State provides a remedy under such circumstances. See State ex rel. Herman v. Schaffer, 105 Ariz. 478, 467 P. 2d 66, 74 (1970). Virginians, however, have such a claim because their state refuses to provide a remedy. Thus it is only because of its own refusal to provide a remedy that Virginia must defend such due process claims in federal court.

While it is clear that this Court, in Hudson v. Palmer, supra., intended to limit federal jurisdiction, it is equally clear that this Court did not intened to eliminate federal jurisdiction when the state, ultimately, refuses to provide a postdeprivation remedy. Rather, it was the intent of this Court to prescribe a federalist scheme, by which postdeprivation claimants would have access to the federalist courts only if the state refused to provide a remedy. To

label such a scheme as an attempt "to establish a regime of federal collateral review of state civil judgments akin to that of habeas corpus review of state criminal convictions", as did the Court of Appeals herein, is to misconstrue the nature of the federalist scheme suggested by this Court in Hudson.

Having required Parratt and Hudson litigants to first seek compensation in state court before gaining entree to federal court, it would be ironic, indeed, for the federal courts to then slam shut the courthouse door upon a plea of res judicata. The decision of the Court of Appeals in this case would do just that as to all postdeprivation due process litigants, for in each such case, the claimants would be barred from federal court by their attempt, pursuant to the mandates of this Court, to seek a state court remedy. Thus,

a claimed due process violation arising under the United States Constitution could never be litigated in federal court in a postdeprivation case. Certainly such a result is inappropriate and was never intended by this Court.

The Court of Appeals' concern over a muliplicity of law suits is not well-founded. As long as the State provides a remedy, no federal suit will result. Only where, as in this case, the State refuses to provide a remedy, will there potentially be a subsequent federal action. The possibility of such a suit when the State refuses to provide a remedy certainly must have been within the contemplation of this Court when it fashioned a federalist scheme for such claims. It should not, therefore, interfere with the availability of a federal forum in those instances in which the State itself creates the federal due process claim by its refusal to provide its

own remedy.

The decision of the Court of Appeals is, therefore, in conflict with this Court's decision in Hudson v. Palmer, supra.

CONCLUSION

For the reasons state herein, the writ of certiorari to the United States Court of Appeals For the Fourth Circuit should be granted and the decision below reveresed.

Respectfully submitted,

GERALD T. ZERKIN
ZERKIN, HEARD & SCOVILL
4 North First Street
Richmond, Virginia 23219
(804) 788-4412
Attorney for Petitioners

August 15, 1985

APPENDICES

**

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-1769

Gordon H. Lawhorn,
Violet Lawhorn,

Appellants,

versus

Harold C. King,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. D. Dortch Warriner, District Judge. (C/A 84-0134)

Argued: February 7, 1985
Decided: May 20, 1985

Before CHAPMAN and WILKINSON, Circuit Judges, and BOYLE, United States District Judge for the Eastern District of North Carolina, sitting by designation.

Gerald T. Zerkin (Zerkin & Heard on brief) for Appellants; John M. McCarthy, Assistant Attorney General (Gerald L. Baliles, Attorney

General; Walter A. McFarlane, Deputy Attorney General; John J. Beall, Jr., Senior Assistant Attorney General on brief) for Appellees.

PER CURIAM:

This lawsuit seeks to establish a regime of federal collateral review of state civil judments akin to that of habeas corpus review of state criminal convictions. Appellants Gordon H. and Violet Lawhorn, having twice failed to obtain equitable or legal relief in the Virginia state courts from the alleged breach of a contract by a state agency, brought this action in federal court under 42 U.S.C. § 1983, complaining of deprivation of property without due process of law or just compensation, based upon the same facts. Believing here that finality must reign, we affirm the district court's holding that this action is barred by the doctrine of res judicata.

The Lawhorns own real property in Mechanicsville, Virginia along Route 301. In 1954, as part of a condemnation proceeding to acquire a portion of the Lawhorns' land with which to widen the adjoining road, the Virginia State Department of Highways agreed to pay the couple $530.00 and build a crossover from the northbound lane to the southbound lane fronting their property. When the Department at last widened the highway, however, it informed the Lawhorns in 1976 that it would not construct the crossover, citing safety considerations and departmental policy.

Upon learning of the state's decision, the Lawhorns brough suit in the Circuit Court of Hanover County, seeking injunctive relief to compel specific performance of the contract (Lawhorn I). The circuit court, sitting in equity, refused to order performance, holding that plaintiffs had no property interest in the crossover and that the contract,

although valid, was unenforceable, being subject to the proper exercise of the state's police power. The Supreme Court of Virginia, finding no reversible error, denied plaintiffs' appeal. Thereafter, the Lawhorns brought another action to recover damages for beach of the contract in the Circuit Court of the City of Richmond (Lawhorn II). That court ruled that the new action, although not res judicata, was barred under the doctrine of collateral estoppel, because entitlement to damages could not be established where the contract had been held unenforceable. Again the Virginia Supreme Court upheld the adverse decision, finding no reversible error.

Plaintiffs have walked their claim through every avenue provided them by the state courts of Virginia. Dissatisfied with the results reached by those bodies, they now come before this court with a quiver

full of federal questions. Subject matter jurisdiction exists for the federal courts to hear these constitutional issues pursuant to § 1983. See Bell v. Hood, 327 U.S. 678, 682-83 (1946); Atkins v. School Board of Halifax County, 379 F. Supp. 1060, 1061-62 (W.D. Va. 1974), aff'd, 511 F. 2d 1398 (4th Cir., 1975) (jurisdiction found to hear due process and just compensation claims arising from state eminent domain proceedings). The Lawhorns, however, have failed to state a claim for relief owing to the two prior state adjudications and established principles of res judicata.

Nothing prevented plaintiffs from raising their constitutional issues in the state proceedings. Beyond question, state and federal courts have concurrent jurisdiction over § 1983 actions. See, e.g. Long v. District of Columbia, 469 F. 2d 927, 937

(D.C. Cir. 1972); Davis v. Towe, 379 F. Supp. 536, 538 (E.D. Va. 1974), aff'd,, 526 F. 2d 588 (4th Cir. 1975). Plaintiffs could have been heard in the initial equity action on their legal issues as well, under settled Virginia law, for in a "chancery cause the court has broad power to proceed to a complete adjudication of all rights asserted by the parties in order to avoid a mulipli-city of suits and to terminate litigation." Fidelity & Casualty Co. v. First National Exchange Bank, 213 Va. 531, 193 S.E. 2d 678, 684 (1973). Once equity jurisdiction is acquired the court may also enforce legal rights and apply legal remedies to ensure full relief. Stevens v. Sparks, 205 Va. 128, 135 S.E. 2d 140, 144 (1964). Furthermore, plaintiffs might have aired their fedeal issues in their subsequent state action for damages at law, for Lawhorn I was not there regarded as res judicata,

though specific issues actually resolved earlier could not be relitigated in Lawhorn II.

Plaintiffs contend that, under Parratt v. Taylor, 451 U.S. 527 (1981) and Hudson v. Palmer, ___U.S.____, 104 S.Ct. 3194 (1984), they could not have litigated their constitutional issues until they had established that the state would accord them no post-deprivation remedy. In this suit they are no longer seeking damages based upon the contract, but have shifted their stance to argue that they were deprived of their real property without due process or just compensation, because the state withheld part of the compensation originally promised in 1954 without offering alternative payment for the land taken. There is no reason why this theory of the case could not have been litigated in either of the state proceedings. Parratt and Hudson

hold only that a negligent or intentional property deprivation of a "random and unauthorized" nature does not constitute a due process violation where the state makes available a "meaningful postdeprivation remedy." Hudson, 104 S.Ct. at 3203. Neither decision can be seriously read to compel splitting of state and federal issues otherwise capable of being litigated in the same court as alternative theories.[1] Due process only entails a meaningful opportunity to be heard, Parratt, 451 U.S. at 541, and defeat on the substantive merits of the state law

---

[1] Assuming that the unenforceability of the contract based upon exercise of the state police power also precluded alternative compensation under state law for the taking of the Lawhorns' land, the deprivation would then be regarded as "conduct pursuant to established state procedure," Hudson, 104 S.Ct. at 3203, rather than random and unauthorized, and a § 1983 action could have been commenced initially either in federal or state court, under Logan v. Zimmerman Brush Co., 455 U.S. 422, 435-36 (1982), without need for any prior resort to fruitless state remedies. Having elected to pursue their claims through state court, plaintiffs must bear the consequences of those proceedings.

issues did not confer on plaintiffs an automatic right to shift to a federal forum without demonstrating that they were deprived in any way of the procedural protections the Fourteenth Amendment guarantees.

Virginia adheres to the general rule of res judicata that when a second suit is between the same parties and on the same "cause of action" as the first, the prior judgment is conclusive "not only as to every question which was decided, but also as to every other matter which the parties might have litigated and had determined... incident to or essentially connected with the subject matter of the litigation." Kemp v. Miller, 166 Va. 661, 186 S.E. 99, 103 (1936); quoted in Eason v. Eason, 204 Va. 347 131 S.E. 2d 280, 282 (1963). See also Kriesel V. Berkshire Associates, Inc., 452 F. 2d 491, 494 (4th Cir. 1971). We are required to give preclusive effect to state court judgments in § 1983 actions whenever

the courts of the state from which the judgments emerged would do so, under 28 U.S.C. § 1738. Allen v. McCurry, 449 U.S. 90 (1980). Thus, the crucial question in our res judicata analysis is whether the "cause of action" involved here and in the prior state proceedings would be regarded as the same under Virginia law. "Cause of action," for res judicata purposes, has been defined by the Virginia Supreme Court as "an assertion of particular legal rights which have arisen out os a definable factual transaction," Bates v. Devers, 214 Va. 667, 202 S.E. 2d 917, 921 n. 8, and a single cause of action "may present several factual and legal issues." Id. Virginia's adoption of the transactional test for determining a cause of action, see 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4407 (1981), forecloses any argument that

plaintiffs' prior state suits involved different causes of action, for the underlying factual basis for all three of these suits has been identical. Therefore, plaintiffs' § 1983 issues, which might have been raised in either Lawhorn I or Lawhorn II, must be held barred by res judicata. The law is clear that plaintiffs "may not relitigate their case through the entire federal system merely because constitutional claims are in issue," Atkins, 379 F. Supp. at 1062, weh the same federal issues of just compensation and due process could have been presented in state court. Id. at 1063 n. 2. "[S]tate courts are fully empowered to decide federal claims and...the Civil Rights Act is not a vehicle for collateral attack upon final state court judgments." Bricker v. Crane, 468 F. 2d 1228, 1231 (1st Cir. 1972), cert. denied, 410 U.S. 930 (1973).

The case before us now, although disguised as a new due process claim, is in reality

nothing more than an attempt to avoid the consequences of a prior state adjudication on the same cause of action. A wolf in sheep's clothing remains a wolf. The parties involved here are the same, the underlying factual controversy is the same, and, as the district court observed, "there is no question but that whatever remedy, if any, plaintiffs may be entitled to here they were no less entitled to there." This litigation should have terminated long ago.

The judgment of the district court is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

GORDON H. LAWHORN, et al.	)	
	)	
v.	)	C.A. No.:
	)	84-0134-R
HAROLD C. KING	)	

OPINION

Plaintiffs have twice before filed civil actions against defendant herein, or his predecessor in office, seeking relief first in equity and then in law for defendant's failure to fulfill his contractual obligation to plaintiffs to build a cross-over in front of their property on U.S. Route 301. In each of those cases plaintiffs could have asserted, without hindrance or let, the precise and identical claim they assert in the instant action. In both actions the trial courts were as competent to adjudge the claim asserted herein as they were the claims actually asserted. The facts were identical. The parties were identical or were privy. Though the nature of the relief

sought in the three cases may be said to differ slightly, there is no question but that whatever remedy, if any, plaintiffs may be entitled to here they were no less entitled to there. Finally, whatever restrictions there may be on a State court with respect to the grant of relief under State law, there is no State law which could prohibit a State court granting relief due under the Constitution of the United States. Thus plaintiff has at least twice before had the opportunity and probably the obligation, to assert the claim asserted in this action.

Under such circumstances the doctrine of res judicata must be applied.

Having recently reviewed this law at some length in Croatan Books, Inc. v. Gerald L. Baliles, et al., ___F. Supp.___, ___(E.D. Va. 1984), I will not retrace those steps in this case. I refer counsel to the cited opinion for my reasoning in affirming the bar of res judicata to the instant case.

There is a further reason for dismissing the case. This is a breach of contract case. The existence of the contract and its validity is not disputed nor is its breach. The only question arising is whether plaintiffs are entitled to damages and if so how much. It has been repeatedly recognized that allegations of due process violations cannot create a substantial federal claim where the real basis for the suit is a mere breach of contract. Manila Investment Co. v. Trammell, 239 U.S. 31, 32 (1915); McCormick v. Oklahoma City, 236 U.S. 657, 659-60 (1915); Shawnee Sewage & Drainage Co. v. Stearns, 220 U.S. 462, 471 (1911); Coastal Petroleum Co. v. Collins, 234 F. 2d 319, 320 (5th Cir. 1956). This proposition was recently reaffirmed by the Fourth Circuit in Heath v. City of Fairfax, 542 F. 2d 1236, 1238 (4th Cir. 1976). There is no apparent reason why the established law should not

apply here. Were the rule otherwise, practically any breach of contract suit might be brought into federal court under the guise of substantive due process by artful draftmanship. In this regard see the unpublished opinion in Morton Howard v. E. Jean Walker, et al., No. 83-1792 (4th Cir. 10 April 1984). My comments on this aspect of the case is a virtual quotation from that opinion.

The motion to dismiss will be GRANTED.

And it is so ORDERED.

U.S. District Judge

Date: 18 April 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

GORDON H. LAWHORN, et al.	)	
	)	
v.	)	C.A. No.:
	)	84-0134-R
HAROLD C. KING	)	

JUDGMENT

For the reasons stated in the accompanying opinion, this action is DISMISSED.

And it is so ORDERED.

U.S. District Judge

Date: 18 April 1984

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

GORDON H. LAWHORN VIOLET LAWHORN, Plaintiffs, v. HAROLD C. KING, Defendant.	)	C.A. No._____ COMPLAINT

Preliminary Statement

1. This action is brought by Gordon H. and Violet Lawhorn, husband and wife against Harold C. King and the Commissioner of the Virginia Department of Highways and Transportation for the deprivation of their property without due process of law or just compensation in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution and 42 U.S.C. Section 1983. Plaintiffs allege that defendant refused to pay plaintiffs compensation for their real property which the Commonwealth had obtained by induc-

ing plaintiffs to waive their right to contest the compensation to be paid with considerations that defendant and his predecessors in office then refused to provide.

Jurisdiction

2. This Court has jurisdiction over plaintiff's claim pursuant to 28 U.S.C. Section 1343.

Parties

3. Gordon H. Lawhorn and Violet A. Lawhorn at all times relevant hereto were owners of real property located on Route 301 in Mechanicsville, Virginia upon which they operated a business known as Lawhorn, Inc.

4. Defendant Harold C. King is the present Commissioner of the Virginia Department of Highways and Transportation. As such he is responsible for the approval of highway construction plans and the determin-

ation of compensation for owners of property seized by the Commonwealth for the purpose of such construction.

Statement of Facts

5. In 1954, the then Commissioner of Highways and Transportation notified plaintiffs that the Commonwealth intended to exercise its power of eminent domain over a portion of plaintiff's real property for the purpose of widening Route 301.

6. Following that notice, plaintiffs agreed not to contest in court the amount of compensation to be paid to them by the Commonwealth of Virginia in consideration for the Commissioner's promise to build a crossover from the north bound lane to the south bound lane in front of their property.

7. In agreeing not to contest the compensation due, plaintiffs relied specifically on the aforementioned promise.

8. By letter dated June 15, 1976, then Commissioner Fugate, by his authorized agent, advised plaintiffs that the crossover would not be constructed when Route 301 was widened. (A copy of that letter is attached hereto as Exhibit "A").

9. Plaintiffs thereafter brought an action for injunctive relief in the Circuit Court of Hanover County against John Harwood, who had succeeded Fugate, but were denied such relief on the grounds that they had an adequate remedy at law, i.e., a suit for monetary damages.

10. Following the failure of plaintiffs to obtain injunctive relief in the courts of the Commonwealth of Virginia, Shoosmith Brothers, Inc., a construction contractor, pursuant to a contract with the Commonwealth of Virginia, performed the widening of Route 301 without constructing a crossover for plaintiffs.

11. Plaintiffs thereafter brought an

action against defendant King in the Circuit Court of the City of Richmond for damages arising from the failure to construct the promised crossover. On January 6, 1983, the judge of the aforesaid court dismissed plaintiff's suit. On December 5, 1983, plaintiffs were denied a writ of error to the Virginia Supreme Court.

12. As a result of defendant's actions, plaintiffs have suffered substantial economic injury.

Cause of Action

13. By refusing to pay plaintiffs compensation for their real property after inducing them to waive their right to due process by promising certain considerations which he then refused to provide, defendant deprived plaintiffs of their right to property without due process of law or just compensation in violation of their rights

under the Fifth and Fourteenth Amendments to the U.S. Constitution and 42 U.S.C. § 1983.

WHEREFORE, plaintiffs respectfully request this Court to award them the following relief:

1. Declare defendant's actions to be violative of plaintiff's right to due process of law and just compensation for their property.

2. Award plaintiffs appropriate compensatory and punitive damages.

3. Award plaintiffs reasonable attorney fees and their costs in this behalf extended.

4. Grant such further relief as the Court deems just and proper.

GORDON H. LAWHORN
VIOLET LAWHORN

By_____
Counsel

Gerald T. Zerkin
ZERKIN, WRIGHT & HEARD
503-B East Main St.
Richmond, Virginia 23219

******

Supreme Court, U.S.
FILED
SEP 18 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-280

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

GORDON H. LAWHORN, et al.
Petitioners,

v.

HAROLD C. KING,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

William G. Broaddus
Attorney General

Walter A. McFarlane
Deputy Attorney General

John J. Beall, Jr., Senior
Assistant Attorney General

John M. McCarthy
Assistant Attorney General
Office of the Attorney General
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-1582
September 18, 1985

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

OPINIONS BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED 2,3

STATEMENT OF FACTS 3

ARGUMENT 7

CONCLUSION 13

TABLE OF AUTHORITIES

Page

Cases

Gorieb v. Fox, 145 Va. 554,
134 S.E. 914 (1926) 11

Hudson v. Palmer,
___ U.S. ___, 104
S. Ct. 3194 (1984) 8,9,10

Parratt v. Taylor,
451 U.S. 527 (1981) 9,10

Richmond, Fredericksburg, &
Potomac Railroad Co. v. City
of Richmond, 145 Va. 225;
133 S.E. 800, 806 (1926) 11

Statutes

42 U.S.C. § 1983 5,6,7,9,11

No. 85-280

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

GORDON H. LAWHORN, et al.
Petitioners,

v.

HAROLD C. KING,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Harold C. King (Commissioner, Virginia Department of Highways and Transportation) respectfully requests that this Court deny the petition for writ of certiorari which seeks review of the per curiam opinion and order of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The per curiam opinion to which a writ of certiorari is sought is not reported. A copy of that opinion, however, appears beginning at p. 1a of Appendix A of the Petition for Writ of Certiorari heretofore filed. The earlier opinion of the United States District Court for the Eastern District of Virginia follows immediately thereafter in said petition, beginning at p. 13a, as Appendix B thereof.

JURISDICTION

The judgment of the Fourth Circuit was entered on May 20, 1985. The petition for writ of certiorari was filed on August 19, 1985. The jurisdiction of this Court was invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether The Court Of Appeals Erred In Holding That Petitioner's Federal Action Brought Under 42 U.S.C. § 1983 Was Barred Under The Doctrine Of Res

Judicata Inasmuch As Petitioner Had Unsuccessfully Litigated In State Court Proceedings Claims Arising From Precisely The Same Factual Basis As The Later § 1983 Claim?

2. Whether The Excusable Breach Of A Contract Right Granted In Partial Settlement Of A Real Estate Condemnation Suit Concluded Twenty-Two Years Earlier So Vitiates That Earlier Grant of Pre-Deprivation Process As To Render The "Taking" One "Without Due Process Of Law"?

STATEMENT OF FACTS

The petitioners are owners of commercial real property in Hanover County, Virginia located along four-lane Route 301. In 1954, and in settlement of a condemnation proceeding brought by respondent's predecessor to acquire a strip of petitioners' land with which to widen from two to four lanes that adjoining route, it was agreed that the State's highway department would pay petitioners a cash amount. The highway department also agreed to build a lane crossover

in front of petitioners' property which would serve to connect the then contemplated two sets of lanes.

Twenty-two years later, when the highway department at last was able to widen the highway, it declined to construct the crossover, claiming that, due to fiscal restraints, it had been compelled to resort to utilization of the two pre-existing lanes as one-half of the "new" four lane roadway. This revised construction plan created a potentially dangerous difference in elevation at the previously planned crossover point, compounded by the obsolete sight line standards of the older of the two sets of lanes.

Faced with the state's position, the Lawhorns resorted to litigation in a state court of record seeking injunctive relief to compel the state to construct and maintain a crossover (a suit referred to by the Fourth Circuit, and hereafter by this respondent, as "Lawhorn I"). The state court declined to grant the requested relief, holding that the petitioners had never acquired through their agreement such property interest in the proposed situs of the crossover as would entitle them to injunctive relief. Additionally, the Lawhorn I court held that the contract, though valid, had

been at all times subject to a lawful exercise of the state's police powers which had been lawfully invoked by respondent because of valid safety concerns. Finding no reversible error, the Supreme Court of Virginia denied petitioners' appeal.

Thereafter, petitioners launched a second action in another state court of record to recover damages for breach of contract ("Lawhorn II"). Applying settled state law, including the doctrine of collateral estoppel to Lawhorn I's findings, the Lawhorn II court essentially held that where, as here, the state's refusal to honor a contractual obligation of this nature rested upon a subsequent, bona fide exercise of its police power, the result was deemed to be damnum absque injuria. An appeal was again undertaken to the Supreme Court of Virginia which, once again, found no reversible error.

At this juncture, petitioners resorted to the federal courts, bringing an action for compensatory and punitive damages in the United States District Court for the Eastern District of Virginia, alleging subject matter jurisdiction under 42 U.S.C. § 1983. Petitioners stated their cause of action against respondent in their federal complaint as follows:

Cause of Action

> 13. By refusing to pay plaintiffs compensation for their real property after inducing them to waive their right to due process by promising certain considerations [i.e., the crossover] which he then refused to provide, defendant deprived plaintiffs of their right to property without due process of law or just compensation in violation of their rights under the Fifth and Fourteenth Amendments to the U. S. Constitution and 42 U.S.C. § 1983. [bracketed material supplied.]

In response to Lawhorn III, the respondent filed motions both to dismiss and for summary judgment, alleging, inter alia, that the two prior final judgments on the merits had the res judicata effect of barring this third lawsuit which was grounded in the same factual circumstances.

Granting the respondent's motion to dismiss, the federal district court judge observed:

> * * * [W]hatever restrictions there may be on a State court with respect to the grant of relief under State law, there is no State law which could prohibit a State court [from] granting relief due under the Constitution of the United States. Thus plaintiff has at least twice before had the opportunity and probably the

> obligation, to assert the claim asserted in this action. [See petitioners' Appendix B at 14a.]

Petitioners had sought to avoid the looming spectre of a res judicata bar to their thrice launched cause of action by emphasizing different aspects of the same facts which had supported, as well, their earlier two lawsuits. As the Fourth Circuit was to later observe:

> In this suit they are no longer seeking damages upon the contract, but have shifted their stance to argue that they were deprived of their real property without due process or just compensation, because the state withheld part of the compensation originally promised in 1954 without offering alternative payment for the land taken. There is no reason why this theory of the case could not have been litigated in either of the State proceedings. [emphasis supplied.] [See petitioners' Appendix A at 7a.]

ARGUMENT

1. The Court Of Appeals Did Not Err In Holding That Petitioners' Federal Action Under 42 U.S.C. § 1983 Was Barred Under The Doctrine Of Res Judicata Inasmuch As Petitioner Had Unsuccessfully Litigated In State Court Proceedings Claims

Arising From Precisely The Same Factual Basis As The Later § 1983 Claim.

Solely because they failed to prevail in either of those two prior state court actions, petitioners now allege they thereby successfully answered in the negative the "actual holding in Hudson" (Pet., p. 9), namely, that " 'the controlling inquiry is solely whether the State is in a position to provide for predeprivation process.' " Id. quoting Hudson v. Palmer, _____ U.S. _____, 104 S. Ct. 3194, 3204 (1984). Accordingly, petitioners next implicitly assert the fact that they twice failed to prevail "thereby satisfied the pre-requisites [sic] for the commencement of their federal due process claim...." (Pet., p. 11.)

The disappointing results obtained by plaintiffs in their two actions before state courts proves merely that the particular remedies pressed before those state court were unavailing solely because of established, substantive legal precedent. The Fourth Circuit aptly notes this by observing in its opinion that "defeat on the substantive merits of the state law issues did not confer on plaintiffs an automatic right to shift to a federal forum without demonstrating that

they were deprived in any way of the procedural protections the Fourteenth Amendment guarantees." (petitioners' Appendix A, at 8a and 9a) (emphasis supplied.) "The state provides a remedy to persons who believe they have suffered *** loss at the hands of the State." Parratt v. Taylor, 451 U.S. 527, 543 (1981) (emphasis supplied). A hearing must be held before one is finally deprived of his property. Id. at 540. Petitioners were heard a total of four times in state trial and appellate courts. In a nutshell, fair and ample forums were provided in which to "assess the propriety of the State's action." Id. at 539.

Had petitioners properly raised their § 1983 claims in state court and been denied the procedural right to pursue that claim or, alternatively, been denied relief on such a claim for reasons contrary to the controlling interpretations of substantive constitutional law by the federal judiciary, then their claim of a later right of federal judicial access would have merited serious consideration.

At page 12, et seq. of their petition, petitioners seemingly interpret Hudson as requiring that every potential litigant claiming a deprivation of property without due

process and desiring to pursue a § 1983 claim in a federal forum first wind his way through the state court in order to demonstrate the unavailability of a state remedy. Obviously, the case does not stand for that proposition at all, for in fashioning a rule that would unburden the federal courts of the necessity of hearing every property deprivation of a random and unauthorized nature, this Court did not thereby thrust upon the state courts the duty of serving as mere academic laboratories to prove through costly, actual litigation that a state procedural remedy was not available. Indeed, in both Parratt and in Hudson, this Court judicially noticed the availability and nature of various state procedural remedies.

The Fourth Circuit's discussion concerning the applicability of the principles of res judicata to this case is flawless and no purpose would be served by its complete repetition here. Suffice it to observe that while petitioners attempt to avoid the Fourth Circuit's res judicata analysis, they are unable to challenge its correctness. That unforeseeable safety considerations frustrated the fulfillment of that obligation does not render constitutionally infirm a

condemnation proceeding amicably concluded some twenty-two years earlier! In this regard, it should be noted that even twenty-two years earlier it had been settled law in the Commonwealth that state officials could not relinquish by contract the Commonwealth's right and obligation to validly invoke the state's police power.* Richmond, Fredericksburg, & Potomac Railroad Co. v. City of Richmond, 145 Va. 225, 246, 133 S.E. 800, 806 (1926), Gorieb v. Fox, 145 Va. 554, 560, 134 S.E. 914, 916 (1926), aff'd, 274 U.S. 603, (1927).

2. The Excusable Breach Of A Contract Right Granted In Partial Settlement Of A Real Estate Condemnation Suit Concluded Twenty-Two Years Earlier Does Not Vitiate The Earlier Grant Of Pre-Deprivation Process.

Although the Fourth Circuit chose to focus exclusively upon the res judicata bar to the petitioners' § 1983 claim, the alternative ground invoked by the federal district is deserving

---

*The failure to construct the crossover, of course, has not deprived petitioners of access to Route 301. They retain immediate access to its northbound lanes and slight, very slight, circuity of access to its southbound lanes.

of mention, for it lays bare the pleading ploy by which petitioenrs attempted to breath new life into a twice concluded lawsuit.

The district court judge correctly and astutely apprehended that petitioners' claim was in reality a twice-tried breach of contract case. (See petitioners' Appendix B, p. 15a.) The petitioners' right to just compensation as determined through a pre-deprivation proceeding was fully honored by the Commonwealth. Petitioners chose in settlement as compensation some cash and a contract right which, perforce, had to remain executory until such time as a new four-lane divided route could thereafter be constructed. As heretofore noted, by entering into that contract, the Commonwealth's highway officials could not and did not bargain away for all time the state's right to validly invoke its police power.

Petitioners suggest the mere frustration of a contract right some twenty-two years later entirely vitiates both the original, impeccable grant of pre-deprivation process and the just compensation paid. This is just the sort of "artful draftsmanship" which the district court intimates could

transform "practically any breach of contract suit" (petitioners' Appendix B at 16a) against a governmental body into a federal claim of constitutional magnitude.

CONCLUSION

For the reasons stated above, respondent requests that the decision of the United States Court of Appeals for the Fourth Circuit be affirmed and the petition for certiorari denied.

Respectfully submitted,

HAROLD C. KING

BY: _____
Counsel

William G. Broaddus
Attorney General

Walter A. McFarlane
Deputy Attorney General

John J. Beall, Jr., Senior
Assistant Attorney General

John M. McCarthy
Assistant Attorney General

Office of the Attorney General
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-1582
September 18, 1985

CERTIFICATE

In accordance with Rule 28 of the Rules of the United States Supreme Court I hereby certify that three copies of the foregoing Brief for the Respondent In Opposition were mailed, postage prepaid, this 17 day of September, 1985, to Gerald T. Zerkin, Esquire, Zerkin, Heard & Scovill, 4 North First Street, Richmond, Virginia 23219, counsel for petitioners.